

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

August 1, 2001

IN RE:)	
)	
SECOND COMPLAINT OF DISCOUNT)	DOCKET NO.
COMMUNICATIONS, INC. AGAINST)	00-01151
BELLSOUTH TELECOMMUNICATIONS, INC.)	

**ORDER STAYING PROCEEDINGS IN THIS DOCKET AS A RESULT
OF THE IMPOSITION OF AN AUTOMATIC STAY ARISING FROM THE
BANKRUPTCY PETITION FILED BY DISCOUNT COMMUNICATIONS, INC.**

This matter is before the Hearing Officer upon the *Notice Regarding Breach of Escrow Arrangement and Intention to Terminate Service* ("Notice") filed by BellSouth Telecommunications, Inc. ("BellSouth") on July 25, 2001. As a result of a Petition filed by ATM/Discount Communications, Inc. in the United States Bankruptcy Court, Western District of Tennessee, on July 27, 2001, and based upon the representations of the parties to this action regarding the automatic stay¹ in place arising out of that Petition, the Hearing Officer determines that any proceedings in this docket relative to BellSouth's Notice be stayed, pending express permission from the Bankruptcy Court allowing the Tennessee Regulatory Authority ("Authority" or "TRA") to proceed with this matter. As a result, the Hearing Officer further determines that BellSouth shall take no action to terminate service to Discount while the proceedings in this docket remain subject to the automatic stay arising out of the Bankruptcy proceeding. Upon the removal of the automatic stay, the Authority shall proceed with the

¹ Hereinafter, the automatic stay pursuant to 11 U.S.C. 362 arising out of Discount's Bankruptcy Petition will be referred to simply as "automatic stay."

evidentiary hearing, as originally scheduled for July 31, 2001, to determine whether BellSouth will be permitted to put into effect procedures to terminate service to Discount.

Travel of this Case

On December 29, 2000, Discount Communications (“Discount”) filed its *Second Complaint against BellSouth Telecommunications, Inc.* (“Second Complaint”) with the Authority. Discount stated that the complaint was being filed in response to an Order of the United States Bankruptcy Court for the Western District of Tennessee, which “directed Discount to file by the end of the year ‘a formal complaint with the TRA asserting any and all unresolved billing disputes’ which are ‘subject to the jurisdiction of the TRA.’”²

On January 5, 2001, Discount filed its *Motion of Discount Communications to Require BellSouth Telecommunications, Inc. to Continue Service Pending Resolution of this Proceeding* (“Motion to Continue Service”) which stated that on January 3, 2001, Bankruptcy Judge William Houston Brown had orally announced that he had decided to lift the automatic stay that prevented BellSouth from terminating service to Discount. Pursuant to an emergency request by Discount to have the Motion to Continue Service considered, the Authority took up the matter under Miscellaneous Business during the January 9, 2001 Authority Conference. Having been advised by the parties that the Bankruptcy Court’s decision to lift the automatic stay would become effective ten (10) days after entry of a written order in the Bankruptcy proceeding, and as the order had not yet been submitted to the Court for entry, the Directors voted unanimously to hold in abeyance the Motion to Continue Service. BellSouth advised the Authority that it would take no action to terminate service of Discount before the Directors would next meet at the Authority Conference scheduled for January 23, 2001. After determining to hold the Motion

² *Second Complaint of Discount Communications Against BellSouth Telecommunications, Inc.* (December 29, 2000) p. 2.

to Continue Service in abeyance, the Directors addressed the Second Complaint of Discount and voted unanimously to appoint General Counsel or his designee to act as Hearing Officer in this matter, to make findings of fact and conclusions of law, as necessary, and to render an initial decision on the merits of the Second Complaint, pursuant to Tenn. Code Ann. §§ 4-5-301 and 65-2-111.³

On January 22, 2001, Judge Brown of the United States Bankruptcy Court entered a written order that stated:

In light of the court's finding, the court further finds that cause exists to completely lift the automatic stay pursuant to 11 U.S.C. § 362 with respect to BellSouth and to restore BellSouth to all of its pre-petition rights and the stay is hereby lifted. BellSouth and [Discount] are free to exercise whatever rights they deem appropriate before the Tennessee Regulatory Authority.⁴

As a result of the issuance of the Bankruptcy Court's Order, the Hearing Officer contacted the parties as well as the Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate")⁵ and scheduled a meeting to discuss further action in the case. The meeting took place on January 23, 2001, immediately following the Authority Conference. During the January 23rd Conference, the Hearing Officer had provided a report to the Directors regarding the status of the case, specifically addressing the filing of the Bankruptcy Court's Order and purpose of the scheduled meeting.

Based on the filings of the parties and the Consumer Advocate and the discussions during the January 23, 2001 meeting, the Hearing Officer established a schedule for BellSouth to file responses to Discount's Motion to Continue Service and the Second Complaint. The Hearing

³ See, *Order Holding in Abeyance Discount Communications' Motion to Continue Service and Appointing Hearing Officer on the Merits* entered by the Authority on January 12, 2001.

⁴ *In re ATM Discount Communications, Inc.*, Case No. 00-33928-B, Order Denying Debtor's Motion to Assume or Reject Executory Contract and Granting Motion to Lift Automatic Stay (filed Jan. 22, 2001), pp. 1-2.

⁵ The Consumer Advocate became a party to this action upon the granting of its Petition to Intervene on January 26, 2001.

Officer also set a Status Conference to take place on January 31, 2001 for the purposes of discussing the state of the pleadings, the order of the Bankruptcy Court and Discount's Motion to Continue Service. Discount confirmed that it was continuing to deposit \$2500 a day in the escrow account established pursuant to the December 4, 2000 Order of the Bankruptcy Court. BellSouth stated that based upon a current invoice to Discount, the \$2500 per day payment was not sufficient to meet its current expenses relating to Discount's business. BellSouth indicated that it would be raising the issue of the daily escrow deposit amount in its response to Discount's Motion to Continue Service. BellSouth agreed that it would not take action to terminate service to Discount until after it gave notice to the Authority so that any issues involved in continuing service to Discount customers could be resolved prior to termination of service.⁶

On January 26, 2001, BellSouth filed its Response to Discount's Motion to Continue Service ("Response"). In its Response, BellSouth asserted that it should not be ordered to continue providing service to Discount if Discount does not pay its bills for service from BellSouth. In addition, BellSouth addressed the Authority's concerns regarding the provision of service to Discount's customers in the event that BellSouth terminates service to Discount and set forth in the Response a proposal whereby BellSouth would voluntarily accept Discount's customers following such termination. BellSouth requested that the proposal be approved by the Authority.⁷

Pursuant to the earlier meeting of the parties, a Status Conference was held on January 31, 2001. During the Status Conference, the Hearing Officer determined that the issues raised in Discount's Second Complaint should be resolved through an evidentiary hearing and proposed

⁶ See, *Order Granting Consumer Advocate's Petition to Intervene and Setting Filing Schedule and Status Conference* (January 26, 2001).

⁷ See, *BellSouth's Response to Discount Communications' Motion to Require BellSouth Telecommunications, Inc. to Continue Service Pending Resolution of this Proceeding*, pp. 7-8 (January 26, 2001).

dates for the filing of testimony and a hearing. After discussion, the counsel for BellSouth and Discount proposed that parties be permitted to exchange documentation and attempt to resolve the issues through a mediation session facilitated by the Hearing Officer. The Hearing Officer accepted the proposal and scheduled a mediation session for March 2, 2001.⁸

Based upon the information presented by the parties during the January 31, 2001 Status Conference, the Hearing Officer determined that a new escrow agreement be put into place between the parties which would require Discount to pay \$2,800, instead of \$2,500, each calendar day for the duration of the agreement. The parties agreed that in the event of a breach of the agreement by Discount, BellSouth must notify the Hearing Officer or the Authority immediately and the Hearing Officer would have five (5) days from the date of receipt of such notification to act upon any request by BellSouth to terminate service to Discount. As a result of the new escrow arrangement, parties agreed the Hearing Officer should not act on Discount's Motion to Continue Service or BellSouth's request for approval of its proposal to provide service to Discount's customers, but instead should hold both the motion and request in abeyance.⁹

The mediation session scheduled for March 2, 2001, was postponed at the request of the parties. A Status Conference was held on March 21, 2001, to discuss the details of the new escrow agreement, including the commencement of the daily \$2,800 payments by Discount and the selection of an escrow agent. The pending motion and request were not addressed at this Status Conference. Thereafter, the parties continued in their efforts to provide documentation to each other and to reschedule the mediation session. As late as July 20, 2001, the parties were discussing the rescheduling of the mediation session.¹⁰

⁸ See, Transcript of January 31, 2001 Proceedings, pp. 39-44.

⁹ See, Transcript of January 31, 2001 Proceedings, pp. 48-55.

¹⁰ On July 20, 2001, the Hearing Officer received a copy of a letter from counsel for BellSouth to counsel for Discount confirming discussions about rescheduling the mediation session during the month of August.

BellSouth's Notice and Hearing on Discount's Motion to Continue Service

On July 25, 2001, BellSouth served upon Discount and filed with the Authority its *Notice Regarding Breach of Escrow Arrangement and Intention to Terminate Service* ("Notice"). As a part of its Notice, BellSouth alleged that Discount had failed on numerous occasions to make the proper and timely payments into the established escrow account as agreed by the parties. The Notice was supported by an affidavit from a representative of the escrow agent setting forth dates in the months of April, May, and June 2001, when Discount failed to make payments into the escrow account. Upon receiving the Notice, the Hearing Officer contacted the parties and, by agreement, set a meeting of the parties for 3:30 p.m. Friday, July 27, 2001. That meeting was attended by counsel for BellSouth, Discount and the Consumer Advocate. Also in attendance were a representative from BellSouth and a representative from Discount. During that meeting, it was established that the Notice was amended on July 26 and BellSouth agreed that the five days from the date of the Notice would not expire until Thursday, August 2, 2001. The Hearing Officer proposed and the parties agreed that a hearing should proceed on Discount's Motion to Continue Service. The Hearing Officer then set an evidentiary hearing for 1:00 p.m. Tuesday, July 31, 2001 to receive testimony and documentation from the parties concerning the alleged breach of the escrow arrangement. Thereafter, the Hearing Officer would render a decision on Discount's Motion to Continue Service.

On Monday, July 30, 2001, the Hearing Officer was advised by the parties via telephone that Discount had filed a petition for relief in the United States Bankruptcy Court. Although the parties expressed a desire to proceed with the hearing on July 31st in order to establish a record as to the payments by Discount into the escrow accounts, the parties were reluctant to insist on such a hearing in the absence of the lifting of the automatic stay. On Tuesday, July 31, 2001, the Hearing Officer was provided with a copy of Discount's bankruptcy petition which revealed that

the petition had been filed at approximately 1:00 p.m. on Friday, July 27, 2001. The Hearing Officer also received a letter from BellSouth advising that the bankruptcy counsel for Discount would not agree to the filing of a joint motion in the bankruptcy court seeking a lift of the stay for the purpose of conducting the hearing. Based upon this information, the parties agreed that the evidentiary hearing scheduled for July 31, 2001 should not proceed lest such hearing be deemed a violation of the automatic stay.

Based upon the filing of the bankruptcy petition by Discount, thereby imposing an automatic stay on these proceedings before the Authority, and the parties' inability to have the stay lifted prior to the hearing, the Hearing Officer determined that the hearing would not proceed as scheduled. Inasmuch as the Authority, through the Hearing Officer, was prevented from conducting a timely evidentiary hearing, as scheduled, prior to the expiration of the five days notice before termination of Discount's service, the Hearing Officer determines that this matter before the Authority be stayed pending the lifting or dissolution of the automatic stay. Furthermore, the Hearing Officer determines that BellSouth's Notice shall not be effective until such time as the Hearing Officer or Authority can complete an evidentiary hearing and issue an order on Discount's Motion to Continue Service.

IT IS THEREFORE ORDERED THAT:

1. This matter before the Authority is hereby stayed until the United States Bankruptcy Court lifts the automatic stay and expressly permits the Authority to resume its proceedings in this docket.

2. BellSouth shall not take action to implement the terms of its Notice filed on July 25, 2001, until the Authority or Hearing Officer is permitted to hold an evidentiary hearing and render a decision on Discount's Motion to Continue Service and BellSouth's request regarding provision of service to Discount's customers.

3. Any party aggrieved by the Hearing Officer's decision in this matter may file a Petition for Reconsideration with the Hearing Officer within fifteen (15) days from the date of this Order.

4. Any party aggrieved by the decision of the Hearing Officer in this matter may also file a Petition for Appeal with the Tennessee Regulatory Authority within fifteen (15) days from the date of this Order.

J. Richard Collier
J. Richard Collier, Hearing Officer

ATTEST:

K. David Waddell
K. David Waddell, Executive Secretary

August 1, 2001
Date